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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 79-182

LOUIE L. WAINWRIGHT, Secretary
Department of Offender Rehabilitation, State of Florida,

Petitioner,

vs.

EARL GUNSBY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

AND APPENDIX

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPINIONS BELOW

The opinion of the United States Court of Appeals, Fifth Circuit, is reported at 596 F.2d 654 and appears in the appendix hereto as "A. 1-14" The opinion of the United States District Court, Middle District of Florida, Tampa Division, is

reported at 449 F.Supp. 1041 and is also included in the appendix hereto as "A. 15 - 37".

JURISDICTION

The United States District Court of Appeals, Fifth Circuit, entered its judgment on June 6, 1979. This petition for writ of certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

IS TESTIMONY DEEMED COMPELLED UNDER THE FIFTH AND FOURTEENTH AMENDMENTS WHERE A DEFENDANT APPEARS AT A DEPOSITION WITH HIS COUNSEL PURSUANT TO A SUBPOENA ISSUED BY HIS CO-DEFENDANT AND GIVES TESTIMONY WITHOUT INVOKING HIS PRIVILEGE AGAINST SELF-INCRIMINATION.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment provides:

> "No person . . . shall be compelled in any criminal case to be a witness against himself . . ."

The Fourteenth Amendment provides:

> ". . . nor shall any State deprive any person of life liberty or property, without due process of law. . . "

STATEMENT OF THE CASE

Respondent, Earl Gunsby, was charged by the State of Florida with the offense of Robbery. He negotiated a plea agreement whereby he agreed to plead guilty to the robbery and testify against his co-defendants in exchange for a maximum sentence of seven and one-half years.

Immediately after entering his plea, Gunsby appeared before the state attorney and his statement was taken. In this

statement he incriminated himself and his co-defendants. Nevertheless, at the trial of the first co-defendant, Tony Smith, Gunsby's testimony was inconsistent with the statement made to the state attorney and tended to exculpate Smith, who was acquitted.

Subsequently, on June 26, 1974, Florida, through its state attorney, filed a motion to set aside the plea agreement and plea (A. 38-40). On June 27, 1974, the trial judge issued an order (A. 43) directed to Gunsby to show cause why the plea agreement should not be set aside. Gunsby, through his attorney, was served with this "show cause" order. A hearing date of July 26, 1974, was set on this order.

However, on July 15, 1974, prior to this "show cause hearing," Gunsby

appeared pursuant to a subpoena at a deposition to be taken by counsel for his other co-defendant, Gerald Suggs, who had not yet been tried on the robbery.

At the deposition of July 15, 1974, Gunsby was represented by counsel and was not in custody.

Also present at the deposition were Donald M. O'Leary, Assistant State Attorney; G. Robert Schultz, attorney representing Suggs and Morris W. Milton, attorney representing Gunsby.

Prior to the deposition being taken Mr. O'Leary, the assistant state attorney, made the following statement in the record:

> "MR. O'LEARY: Mr. Schultz, excuse me.
>
> Just for the record, I would like to make some prefacing statements just so it be understood, number one, that it be noted Mr. Milton is here representing Mr. Gunsby

in this case; that he is a co-defendant along with Gerald Suggs, and that there was an order entered on June 27 by David Patterson, to show cause, if any, why, if any cause can be shown, Earl Gunsby's agreement and negotiated plea with the State of Florida should not be negated or set aside based on the inconsistent statements and testimony in the trial of a third defendant, Tony Smith. And that he is here now subpoenaed as a defense witness. All right?

MR. SCHULTZ: Correct."

(A. 7-8 and 20-21)

Neither Gunsby nor his counsel interposed any objections to Gunsby's being deposed, nor did either assert Gunsby's privilege against self-incrimination.

On July 28, 1974, the Florida trial court entered an order setting aside the plea agreement and allowed Gunsby to withdraw his previously entered plea of guilty (A. 43).

Prior to his trial, Gunsby moved to suppress both the statement made to the assistant state attorney and the depositions taken by his co-defendant's counsel. The motions were denied and both the statement made to the state attorney and the deposition were introduced in evidence at his trial. Gunsby was convicted and his conviction upheld by the Florida appellate court, *Gunsby v. State*, 316 So.2d 313 (Fla.2d Dist.Ct.App. 1975).

Thereafter, Gunsby petitioned the district court for a writ of habeas corpus contending his right against compulsory self-incrimination had been violated.

Ultimately, after an evidentiary hearing the district court granted the writ finding that both the statement made to the assistant state attorney and the deposition were involuntary. It held

the deposition involuntary because it had been induced by a promise, viz: the agreement to testify against his co-defendants in return for a maximum sentence of seven and one-half years. Refusal to testify at the deposition, reasoned the district court, would not only have subjected Gunsby to contempt, but also have given the state additional grounds for its motion to set aside the plea bargain which Gunsby wanted to avoid. The Fifth Circuit accepted this reasoning and finding in toto.[1]

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1. This petition is concerned only with the deposition and not the statement made to the state attorney. We submit that, unlike the statement because of the applicability of different legal principles, the *deposition* was not compelled and Florida should be free to use the deposition at Mr. Gunsby's retrial.

REASONS FOR GRANTING THE WRIT

1. THE DECISION OF THE FIFTH CIRCUIT COURT OF APPEALS CONFLICTS WITH PREVIOUS DECISIONS OF THE SUPREME COURT OF THE UNITED STATES AND OTHER FEDERAL COURTS OF APPEALS.

This Honorable Court and other federal courts of appeals have held that the privilege against self-incrimination protected by the fifth amendment is not violated unless the government is compelling disclosure. Second, that with but a few exceptions, a person cannot contend he was compelled unless, prior to disclosure, he asserts his privilege against self-incrimination. Consequently, where disclosures are made at a prior trial, civil proceeding or at a deposition by one who fails to assert the privilege, the

disclosures are admissible against that person in a subsequent criminal proceeding, *Garner v. United States*, 424 U.S. 648 (1976) (disclosures in an income tax return); *United States v. Kordel*, 397 U.S. 1 (1970) (disclosures via written interrogatories); *United States v. Haldeman*, 559 F.2d 31 (D.C. Cir. 1976) (disclosures at a congressional hearing); *United States v. Rubinson*, 543 F.2d 951 (2nd Cir. 1976) (civil proceeding); *United States v. Bottone*, 365 F.2d 389 (2nd Cir. 1966) (disclosures at a deposition); *United States v. Cecil*, 457 F.2d 1178 (8th Cir. 1972) (disclosures at a criminal trial of another); *London v. Patterson*, 463 F.2d 95 (9th Cir. 1972) (disclosures at a deposition).

The decision of the Fifth Circuit Court of Appeals conflicts with the

above-cited cases[2] because the Fifth Circuit in its decision held that Gunsby's deposition was involuntary[3] and thus compelled even though (a) it was not taken at the insistence of the State of Florida; (b) Gunsby was not in custody when he was deposed; (c) Gunsby was represented by counsel at the deposition and (d) neither Gunsby nor his counsel asserted his privilege against self-incrimination prior to or while giving his deposition.

Petitioner recognizes that in *Garner* the Court spelled out certain exceptions whereby testimony would be deemed compelled

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2. Significantly, the Fifth Circuit's opinion ignores *Garner*, *Haldeman* and *Kordel*. This was not occasioned by any failure on the part of this petitioner to bring those cases to that court's attention.

3. The lower court applied the "voluntariness" concept, but as the Court in footnote 9 of *Garner* pointed out, "compulsion" is the better concept with respect to a deposition.

even though the privilege is not asserted. But, they all involve, said the Court, some factor which is held to deny the individual freedom of choice to answer or to refuse to answer. The Court then elaborated on three types of situations involving such factors: (a) those dealing with custodial interrogation; (b) those where the invocation of the privilege is itself incriminating; and (c) those where civil or criminal sanctions are imposed if the privilege is asserted. Gunsby was not faced with any such factors in the instant case.

The Fifth Circuit's acceptance of the District Court's findings that the deposition was compelled because (1) Gunsby might possibly have been held in contempt for failure to testify and (2) because his refusal to testify might have provided

the state with additional grounds for setting aside the plea bargain conflicts, additionally, with the court's decisions in *Garner, Kordel* and *McGautha v. California*, 402 U.S. 183 (1971); with the Ninth Circuit's decision in *London v. Patterson, supra*, and with the First Circuit in *Flint v. Mullen*, 499 F.2d 100 (1st Cir. 1974).

First, it conflicts with those decisions because, in essence, they hold that not every possible undesirable consequence which may follow the assertion of the privilege suffices to deny one the freedom to claim it; secondly, that the assertion of the privilege is itself sufficient protection against such sanctions as contempt, *cf. Garner, supra*, and thirdly, *Kordel* and *Patterson, supra*, suggest that the proper remedy is to

seek a protective order, which remedy was available under the Florida Rules of Criminal Procedure.[4]

One cannot possibly follow the legal principles enunciated in the above-cited cases and arrive at the conclusion reached by the Fifth Circuit Court of Appeals in the instant case.

Lastly, the decision of the lower court is in direct conflict with the Court's decision in *Hutto v. Ross*, 429 U.S. 28 (1976). In *Hutto*, the Court held that a confession is not rendered involuntary simply because it would not have been made but for the plea bargain. Misapplying *Hutto* the Fifth Circuit

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4. Florida Rule of Criminal Procedure 3.220(h) provides for protective orders from specific disclosures. Mr. Gunsby could easily have sought one in the Florida trial court before submitting to the deposition. (See A. 46)

held that the deposition was involuntary, not because it was a condition of the plea bargain or because the state was insisting on Gunsby's testimony, but because he and his counsel had the subjective belief that the deposition was a necessary product of the plea bargain. But the Court in *Hutto* specifically rejected ". . . causation in that sense . . . [as] the test of voluntariness. . . ." (429 U.S. at 30). In other words, the Fifth Circuit returned in a veiled fashion to the "but-for" test rejected in *Hutto*.

2. THE DECISION OF THE FIFTH CIRCUIT COURT OF APPEALS ERRONEOUSLY PASSES ON IMPORTANT FEDERAL QUESTIONS INVOLVED IN THE ADMINISTRATION OF CRIMINAL JUSTICE.

As the assistant state attorney's warning clearly demonstrated, Florida was not

eliciting Gunsby's deposition — it was Gunsby's co-defendant, Suggs, who sought to take the deposition. The fifth amendment's privilege against self-incrimination is applicable to states through the fourteenth amendment, *Malloy v. Hogan*, 378 U.S. 1 (1964). But a state should not, through the fourteenth amendment, be held to have violated one's fifth amendment privilege against self-incrimination where it has not insisted on disclosure.[5] The decision of the court below is unsound because it holds that even though the deposition was not elicited by the State of Florida it was

5. It would seem, for instance, that where a deposition is taken in a civil suit by private litigants, the state cannot possibly be held to have compelled disclosure until a state court orders disclosure after assertion of the privilege because until such time there is no "state action".

compelled. It is important because it opens the door for claims of compulsory self-incrimination even in instances where the government is not involved in seeking disclosure.

Furthermore, as the Court well knows, thousands of witnesses testify yearly before congressional and state legislative committees, at criminal and civil trials on proceedings, at administrative hearings and at depositions. Those seeking the testimony of these witnesses have a right to assume that unless the witness invokes the privilege, testimony is not being elicited which the witness deems incriminating, *Garner, supra*. The decision of the court below dispels that assumption. It does so because it allows one, at a later date, to claim that he was compelled to testify by virtue of some alleged

possible consequence unknown to those taking his testimony. Sound policy reasons dictate that one be required to timely assert his privilege: first, if the government insists on disclosure after its assertion it then becomes clear that it is the government that is insisting on disclosure; second, it preserves the historical facts necessary for determining whether the privilege has been violated.

CONCLUSION

For these reasons, petitioner respectfully urges this Court to grant certiorari and reverse the holding of the United States Court of Appeals, Fifth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, CHARLES CORCES, JR., Counsel for Petitioner, and a member of the Bar of the United States Supreme Court, hereby certify that on the 12th day of August, 1979, I served three copies of the Petition for Writ of Certiorari on J. Richard Rahter, Esquire, Counsel for Respondent, 601 49th Street North, St. Petersburg, Florida 33710, by a duly addressed envelope with postage prepaid.

CHARLES CORCES, JR.
Assistant Attorney General

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1978

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UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

A P P E N D I X

GUNSBY v. WAINWRIGHT 5310

Earl GUNSBY, Petitioner-Appellee,

v.

Louie L. WAINWRIGHT, Secretary, Department of Offender Rehabilitation, Respondent-Appellant.

No. 78-2364.

United States Court of Appeals, Fifth Circuit.

June 6, 1979.

Florida prisoner filed a petition for a writ of habeas corpus. The United States District Court for the Middle District of Florida, Ben Krenztman, J., granted relief. Following remand from the Court of Appeals, 552 F.2d 127, for an evidentiary hearing the District Court, 449 F.Supp. 1041, again granted the petition and State appealed. The Court of Appeals, Roney, Circuit Judge, held that: (1) where petitioner made a confession to the prosecutor as a result of the promises made in a plea bargain, which was subsequently withdrawn, the confession was legally involuntary and inadmissible at trial; (2) where, after the State announced its intention to seek nullification of the plea bargain, petitioner was subpoenaed for a deposition and his counsel, anxious to uphold the bargain,

permitted the petitioner to testify, thinking that failure to do so would prejudice the petition's chance of maintaining the bargain, that deposition too was legally involuntary, and (3) though an increased sentence on retrial is prohibited if vindictiveness plays a part in a sentencing process, there is no absolute bar to a more severe sentence on retrial if the State can show identifiable conduct on the part of defendant occurring after the time of the original sentencing that would justify an increased sentence.

Affirmed in part and vacated in part.

1. Habeas Corpus 90

Mixed questions of fact and law do not fall within scope of state court findings to which federal court, on habeas corpus, is required to give deference. 28 U.S.C.A. § 2254(d).

2. Criminal Law 412(1)

Where accused made incriminating statement to prosecutor as result of promises made by State in plea bargain, but that bargain was later nullified on ground that accused's testimony at codefendant's trial was inconsistent with statement, statement was legally involuntarily and inadmissible at accused's state trial.

3. Criminal Law 627.2

Where accused was subpoenaed for deposition and his counsel, anxious to uphold plea bargain which State had announced its intention to seek nullification of, permitted accused to testify thinking failure to do so would prejudice accused's chance of maintaining plea bargain, deposition was legally involuntary and inadmissible at accused's state trial.

4. Criminal Law 190

Increased sentence is prohibited if vindictiveness plays part in sentencing process, but there is no absolute bar to more severe sentence on retrial if State can show identifiable conduct on part of accused occurring after time of original sentencing that would justify increased sentence.

Appeal from the United States District Court for the Middle District of Florida.

Before THORNBERRY, CLARK and RONEY, Circuit Judges.

RONEY, Circuit Judge:

This case involves the proper application of *Hutto v. Ross*, 429 U.S. 28, 97 S.Ct. 202, 50 L.Ed.2d 194 (1976), to the admissibility of (1) a statement made by a defendant to the prosecutor, and (2) a

deposition taken of the defendant under subpoena from a codefendant, both after a plea bargain, which was later set aside at the Government's request. After an evidentiary hearing, the district court held that both the statement and the deposition were legally involuntary, and therefore inadmissible in the state trial because they violated the defendant's constitutional right against self-incrimination. On Florida's appeal from the grant of the writ of habeas corpus, we affirm.

Earl Gunsby, charged with robbery, negotiated a plea bargain whereby he agreed to plead guilty to robbery and testify against two codefendant's in exchange for a maximum sentence of 7½ years and no objection from the State to a probated sentence.

Shortly after entering the guilty plea, Gunsby made a statement to the prosecutor in which he incriminated himself and a codefendant. Gunsby's testimony at trial, however, tended to exculpate rather than incriminate the codefendant, who was acquitted.

The State then moved to vacate Gunsby's plea agreement, contending that Gunsby had made inconsistent statements and thus violated the plea agreement. A show cause order issued and a hearing was set.

Before the hearing, however, Gunsby appeared at a deposition in response to a

subpoena issued by another codefendant who had not yet been tried. Gunsby again incriminated himself.

Despite Gunsby's contention that his statements were not inconsistent, the plea bargain was set aside. Gunsby's motion to suppress both the statement and the deposition was denied and both were introduced at trial. He was convicted of robbery and given a 20-year sentence. The state appellate court affirmed. *Gunsby v. State*, 316 So.2d 313 (Fla.Dist.Ct.App.1975).

Gunsby petitioned the federal court for a writ of habeas corpus contending his right against compulsory self-incrimination under the Fifth Amendment had been violated. Although the petition was originally granted, this Court remanded for an evidentiary hearing on the issue of whether Gunsby's inculpatory statements were part of the plea bargain so that *Hutto v. Ross*, 429 U.S. 28, 97 S.Ct. 202, 50 L.Ed.2d 194 (1976), could be properly applied. *Gunsby v. Wainwright*, 552 F.2d 127 (5th Cir. 1977). The district court again granted the writ of habeas corpus from which the State appeals.

[1] The State's contention that the federal district court erroneously disregarded the findings of the state trial court without finding that its determination was inadequate under one of the grounds enumerated in 28 U.S.C.A. § 2254(d) and *Townsend v. Sain*, 372 U.S.

293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963), overlooks the nature of the state court's determination. The issue of voluntariness in a situation such as presented here involves mixed questions of law and fact. It is well settled that such questions do not fall within the scope of § 2254(d). *Mason v. Balcom*, 531 F.2d 717, 721-722 (5th Cir. 1976); *Lee v. Hopper*, 499 F.2d 456, 462 (5th Cir. 1974), *cert. denied*, 419 U.S. 1053, 95 S.Ct. 633, 42 L.Ed.2d 650 (1974); *Davis v. Heyd*, 479 F.2d 446, 449 (5th Cir. 1973).

Conceding the difficulty of overturning a finding made by a federal district judge, the State does not contest the district court's determination that the statement made to the prosecuting attorney was legally involuntary. *See* Fed.R. Civ.P. 52(a); *Collier v. Estelle*, 506 F.2d 22, 24 (5th Cir. 1975). Looking to what evidence may be available for a new trial, the State contests the district court's ruling on the inadmissibility of the deposition.

[2] The district court appears eminently correct on both counts. In *Hutto v. Ross*, 429 U.S. 28, 97 S.Ct. 202, 50 L.Ed.2d 194 (1976), the Supreme Court rejected a *per se* rule of inadmissibility where a confession is made as a result of a plea bargain. In that case the plea bargain did not call for a confession. Against the advise of his attorney, Hutto made a statement in which he incriminated himself, even though it was made clear to him that the terms of the plea

bargain would continue to be available to him without such a statement. The plea bargain was later withdrawn and the confession introduced at Hutto's trial. The Court held that the confession was not the result of any direct or implied promise and was voluntarily given. Conversely, a confession given as the result of a direct or implied promise would be legally involuntary.

Here, Gunsby made the statement to the prosecutor as a result of the promises made by the State in the plea bargain. That the original statement was part of the plea bargain is demonstrated by the fact that the State obtained nullification of the plea bargain on the ground that Gunsby's testimony at a co-defendant's trial was inconsistent with that statement. The district court's conclusion that the statement was legally involuntary and inadmissible at Gunsby's state trial was thus compelled under *Hutto*.

[3] The decision as to the deposition is somewhat more difficult. Prior to taking the deposition, the State prosecutor made this statement:

> Just for the record, I would like to make some prefacing statements just so it be understood, that number one, that it be noted Mr. Milton is here representing Mr. Gunsby in this case; that he is a co-defendant along with Gerald Suggs, and that there was an order entered on June 27, by David

> Patterson, to show cause if any, why, if any cause can be shown, Earl Gunsby's agreement and negotiated plea with the State of Florida should not be negated or set aside based on the inconsistent statements and testimony in the trial of a third defendant, Tony Smith. And that he is here now subpoenaed as a defense witness.

At first glance, the prosecutor's statement would seem to create a factual situation identical to that of *Hutto*. The ultimate test, however, is whether the deposition was voluntarily given by the petitioner. *See, e.g., United States v. Robertson*, 582 F.2d 1356, 1363 n.14 (5th Cir. 1978). On this issue, the district court made detailed findings of fact which belie this first impression of voluntariness and distinguish the instant case from *Hutto*.

In a revealing preface to its findings, the district court stated:

> The petitioner's exposure to and experience with the criminal justice system at the time of the offense was minimal. Gunsby, who was twenty-one years old when the robbery was committed, had had only minor brushes with the law and had never been convicted of a felony prior to the instant case. He had completed the ninth grade and part of the tenth. His testimony indicates a complete reliance on the advise of his attorney and a failure to appreciate either the

> basic elements or the nuances of the fifth amendment and teachings of *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). The Court finds that the petitioner was not aware of the self-incriminating implications of either his statement or his deposition.

The court then made well-reasoned findings as to why the deposition was not legally voluntary.

> Gunsby had been subpoenaed for the deposition by a co-defendant, Gerald Suggs. At the commencement of the deposition, counsel for the respondent made a statement regarding the pending motion to vacate the plea.
>
> During the deposition the petitioner extensively inculpated himself and Gerald Suggs, and in general discussed the basic facts surrounding the robbery. The petitioner also discussed the planning of the robbery and the beating of Brown by Suggs and Harvey Baker. The petitioner was also questioned at the deposition by trial counsel for respondent, counsel for the co-defendant Suggs, and his own attorney.
>
> At the evidentiary hearing before this Court, O'Leary testified his initial statement was to put the petitioner and his counsel on notice as to the pendency of the motion to vacate and the order to show cause. Counsel for

the petitioner, Morris Milton, testified that he permitted the deposition of his client because the petitioner was bound by the plea agreement and he wanted to uphold the bargain. Milton stated that he was of the opinion that only a court order could revoke the bargain and the only way the state could use Gunsby as a witness was if he appeared at the deposition. Milton further testified that if the plea had been vacated prior to the deposition, he would not have permitted the petitioner to testify.

The Court is of the opinion that the deposition of the petitioner Gunsby was not voluntary on his part. The petitioner was subpoenaed for the deposition and his counsel, anxious to uphold the bargain, permitted the defendant to testify thinking the failure to do so would prejudice the petitioner's chances of maintaining the bargain. The respondent's counsel's statements at the commencement of the deposition are subject to various interpretations. The statement, which did not advise petitioner of the respondent's intention to use the testimony at the petitioner's trial if the motion to vacate was granted, could be interpreted as a threat to petitioner to inculpate Gerald Suggs or suffer the loss of the bargain. It could also be interpreted as a caveat relative to petitioner's fifth amendment privilege.

At the deposition the petitioner in-

culpated Suggs in the planning and commission of the robbery. Although the bargain with the state related to the petitioner's testimony at the Smith and Suggs trials, the Court is of the opinion the deposition was integrally related to the testimony and part and parcel with the bargain. (footnotes omitted).

After a discussion of the law concerning the statement to the prosecutor, the district court went on to give its conclusions of law as to the deposition.

> Although the deposition presents a different factual setting, the assessment of the law is the same. Petitioner was subpoenaed to the deposition; he did not voluntarily present himself. Rule 3.220 of the Florida Rules of Criminal Procedure which permits depositions in criminal cases also provides that "a person who refuses to obey a subpoena served upon him may be adjudged in contempt of the court from which the subpoena issued." Although the Florida state courts have adopted the position that the prosecution is not responsible for the production of its own witnesses at deposition, the prosecution and the nonappearing witness are subject to definite sanctions. *Fla.R.Crim.P.* 3.220(j); *State v. Roig*, 305 So.2d 836 (3d D.C.A.Fla.1974); and *State v. Deville*, 258 So.2d 492 (3d D.C.A.Fla.1972).

In the present circumstance, the petitioner had a bargain with the state to testify against the co-defendant Suggs who had subpoenaed him for the deposition. The possibility of the imposition of sanctions against the petitioner through the Florida Rules of Criminal Procedure was clear, but the possibility of other sanctions, specifically the revocation of the plea agreement, was also looming in the foreground. The respondent argues that the motion to vacate, the order to show cause, and the statement of counsel at the beginning of the deposition placed the petitioner on notice as to the possibilities of non-compliance with the bargain. There is no doubt that the petitioner was on notice at the time of the deposition, but the question is as to what. Respondent argues that the petitioner was on the notice that his statement at the deposition might be used against him. Petitioner argues that he was on notice only that non-compliance would result in revocation. Since the petitioner was satisfied with the plea bargain and wanted it enforced, he testified at the deposition so that he could testify at the trial without complications. The deposition inculpated the petitioner and also inculpated the co-defendant Suggs not only as an accomplice in the robbery, but also as one of the two principal participants.

> In *Bram* [*v. United States*, 168 U.S. 532, 18 S.Ct. 183, 42 L.Ed. 568 (1897)] the Supreme Court suggested consideration of whether the confession was extracted by any direct or implied promises. Here the promise was the bargain; the promise to testify against Suggs and Smith in return for a guilty plea and a seven and one-half year maximum for his sentence. The Court is convinced that the deposition was not voluntary, but part of the promise to testify and compelled by the subpoena. (footnotes omitted).

The district court found that the petitioner himself believed that he was compelled to testify in order to keep the plea bargain. Being so advised, he gave testimony of the kind contemplated by the plea bargain. At no time was he advised, as in *Hutto*, that he need not testify in order to retain the benefits of the plea bargain should the court refuse to nullify it, or that the State would not use his refusal to testify as additional ground for the motion to set aside the plea bargain. From these facts it thus appears that the court properly applied the law. Therefore, its determination that both the statement and the deposition were involuntary, and thus inadmissible at the State trial, must be affirmed.

[4] In its decree, however, the district court also provided:

> In the event petitioner is convicted after a new trial his sentence

shall not exceed the sentence imposed at his original trial . . ..

This portion of the order was premature, and must be vacated. Although *North Carolina v. Pearce*, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), prohibits an increased sentence where vindictiveness plays a part in the sentencing process, it does not impose an absolute bar to a more severe sentence on retrial. Should a conviction result from the new trial, the State would be free to show "identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding" that would justify an increased sentence. *Id.*, 395 U.S. at 726, 89 S.Ct. at 2081. Since the facts regarding petitioner's post-sentencing conduct are not now known, an absolute bar to a more severe sentence cannot properly be imposed under *Pearce*. The portion of the order quoted above is, therefore, vacated.

AFFIRMED IN PART AND VACATED IN PART.

Earl GUNSBY, Petitioner,

v.

Louie L. WAINWRIGHT, Secretary, Department of Offender Rehabilitation, State of Florida, Respondent.

No. 75-640 Civ. T-K

United States District Court, M. D. Florida, Tampa Division.

April 14, 1978.

State prisoner sought habeas corpus. On remand from the Court of Appeals, 552 F.2d 127, which remanded for an evidentiary hearing, the District Court, Krentzman, J., held that: (1) statements and depositions given by defendant in connection with plea bargain were not voluntary so that they should not have been used against him when the state's motion to vacate the plea bargain was later granted and the defendant went to trial, and (2) the possibility that a plea bargain may go awry should be clearly enunciated to a defendant who has pled guilty and who is about to make a statement and the defendant should be informed of his Fifth Amendment privilege and his *Miranda* rights and should be informed as to whether the giving of the statement is an essential part of the plea bargain.

Petition granted.

1. Criminal Law 414

Evidence that the accused was 21 years old when robbery was committed, that he had only minor brushes with the law before, that he had never been convicted of a felony, that he had completed the ninth grade and part of the tenth, and that statement was made pursuant to plea negotiations demonstrated that the statement was not voluntary so that the statement should not have been admitted against the accused when the state was permitted to set aside the plea agreement and accused went to trial.

2. Criminal Law 414

Evidence that accused was subpoenaed for deposition in connection with trial of an alleged accomplice, that accused's attorney permitted him to testify at the deposition for fear that the failure to do so would prejudice his chance of maintaining his plea bargain, which the prosecution was attempting to have set aside, and that the accused was not advised of the state's intention to use the testimony given at the deposition at a trial of the accused if the motion to vacate was granted demonstrated that the deposition testimony was not voluntarily given by accused so that it could not be used against him when the state's motion was granted.

3. Criminal Law 273.1(4)

Although no party anticipates at the inception of the plea bargain that it

will eventually go awry, that possibility should be clearly enunciated to a defendant who has pled guilty and who is about to make a statement and the defendant should be informed of his Fifth Amendment privilege and his *Miranda* rights; the defendant should also be informed by the prosecution whether the giving of the statement is an essential part of the plea bargain. U.S.C.A. Const. Amend. 5.

Earl Gunsby, pro se.

J. Richard Rahter, St. Petersburg, Fla., for petitioner.

Mary Jo Gallay, Asst. Atty. Gen., State of Florida, Tampa, Fla., for respondent.

MEMORANDUM OF DECISION

KRENTZMAN, District Judge.

This is a habeas corpus proceeding pursuant to 28 U.S.C. § 2254, wherein petitioner Earl Gunsby, a state prisoner, alleges a violation of his fifth amendment right to be free from self-incrimination and seeks release from his conviction.

The United States Magistrate of this Court submitted a report recommending that the Court grant the petitioner's

writ of habeas corpus. This Court granted the petitioner's writ of habeas corpus and directed that the respondent either retry the petitioner within 120 days or release him. Upon appeal by respondent, the Fifth Circuit Court of Appeals reversed and remanded for an evidentiary hearing on the petitioner's claims. *Gunsby v. Wainwright*, 552 F.2d 127 (5th Cir. 1977).[1]

This Court conducted an evidentiary hearing at which time both the petitioner and the respondent presented evidence. After the hearing, the Court permitted the parties to submit post-hearing memoranda and directed the respondent to file the transcript of a co-defendant's state court trial.

On December 3, 1973, a salesman, Ronald Brown, working in St. Petersburg, Florida, was assaulted and robbed by two men. At the time of the robbery, Brown noticed a third person who appeared to be a lookout, but did not physically participate in the assault or the robbery. Petitioner was arrested in late December, 1973, and an information charging him with robbery was filed on December 28, 1973, by the state attorney for the Sixth Judicial Circuit of Florida. Petitioner entered a plea of not guilty to the charge on January 18,

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1. The parties had stipulated to the facts prior to the initial appeal to the Fifth Circuit Court of Appeals. Apparently the stipulation went awry after the petitioner-appellee filed his appellate brief.

1974. In addition to the petitioner three other men were charged with participation in the robbery: Tony Smith; Harvey Baker; and Gerald Suggs.

On March 1, 1974, after plea negotiations initiated by the state attorney, Donald O'Leary, the petitioner, with the assistance of his attorney, Morris Milton, changed his plea to guilty. The plea agreement was that petitioner would receive not more than seven and one-half years and that the state would not object if the state court decided to place the petitioner on probation. Additionally, the entire agreement was premised on the petitioner's testifying against the two co-defendants in the case. Immediately after the completion of the change of plea hearing, the petitioner, accompanied by Milton, O'Leary, and a court reporter, commenced the taking of the petitioner's statement regarding the robbery.

On March 28, 1974, the petitioner appeared as a state witness in the trial of Tony Smith. After questioning the petitioner for a short period of time on direct examination, the assistant state attorney, O'Leary, requested that the court permit him to cross-examine the petitioner with his March 1, 1974 sworn statement. The request by O'Leary was premised on his opinion that the petitioner was deviating from his prior statement regarding the involvement of Tony Smith.[2] The

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2. Respondent's trial counsel, Donald O'Leary, testified at the evidentiary hearing that the

court permitted the respondent to cross-examine the petitioner. The jury at the completion of the testimony acquitted Tony Smith.

On June 26, 1974, the respondent moved to have the state court set aside the plea agreement because of the petitioner's testimony at the Smith trial. On July 15, 1974, the petitioner, with counsel, was questioned on deposition by the attorney for the co-defendant, Gerald Suggs. Appearing at the deposition were counsel for the defendant Suggs, Milton, and O'Leary, who was in charge of the prosecution of all four men. Prior to the commencement of the deposition, O'Leary made the following statement on the record.

> Just for the record, I would like to make some prefacing statements just so it be understood, that number one, that it be noted Mr. Milton is here representing Mr. Gunsby in this case; that he is a co-defendant along with Gerald Suggs, and that there was an order entered on June 27, by David

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petitioner deviated substantially from his statement at the Tony Smith trial. Petitioner's counsel testified that there was no deviation, but merely error on O'Leary's part for not having asked the petitioner more specific questions at the time of the March 1, 1974 statement. Since the question of the legitimacy vel non of the revocation of the plea bargain does not rise to the constitutional dimension, the Court need not resolve the disparity of opinion on this point.

> Patterson, to show cause if any, why, if any cause can be shown, Earl Gunsby's agreement and negotiated plea with the State of Florida should not be negated or set aside based on the inconsistent statements and testimony in the trial of a third defendant, Tony Smith. And that he is here now subpoenaed as a defense witness.[3]

Sometime after the deposition, the state court conducted a hearing at which the court permitted the respondent to set aside the plea agreement. Thereupon the petitioner pled not guilty and the case was set for trial in October, 1974.

Soon after the case was set for trial, counsel for the petitioner filed a motion to suppress the petitioner's statements made to a police officer immediately after his arrest, his sworn statement made to the state attorney on March 1, 1974, and his deposition taken on July 15, 1974. The state court granted the motion to suppress as to the statements to the police, but denied the motion as to the other statement and the deposition.

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3. Record at 187-188.

4. It is interesting to note that five different state judges presided over the petitioner's case at various time: 1) arraignment; 2)change of plea hearing and motion to vacate; 3) approval of the plea agreement; 4) motion to suppress hearing; and 5) trial of the case.

At petitioner's trial held on October 25, 1974, the respondent called three witnesses: the victim, Ronald Brown; a convicted co-defendant, Harvey Baker; and a court reporter, Eleanor B. Bothwell. Mr. Brown testified that he could not identify the petitioner as one of the two men who robbed him, but that petitioner might have been the third man who was a lookout. Mr. Harvey testified as to his own involvement in the robbery and implicated the petitioner. Ms. Bothwell, the reporter who had taken both the petitioner's sworn statement and his deposition, read both sets of her notes into evidence. The petitioner objected to the introduction of the statement and the deposition. The jury returned a guilty verdict and petitioner was sentenced to twenty years confinement. Petitioner appealed his conviction and raised as the principal ground for reversal the admission of the statement and the deposition. A unanimous panel of the Florida Second District Court of Appeal affirmed the conviction of the petitioner. *Gunsby v. State*, 316 So.2d 313 (2d D.C.A. Fla. 1975).

The petitioner then filed for a writ of habeas corpus in this Court. The thrust of petitioner's claim is that the sworn statement and the deposition were made pursuant to the plea agreement and were thus inadmissible at his trial.

In this Court's order initially granting the petition, the Court relied on the Magistrate's report which cited *Ross v. Meek*, 531 F.2d 924 (8th Cir. 1976). The

Eighth Circuit in *Ross* established a per se inadmissibility rule to statements given as a result of a plea agreement. Several days after this Court entered its order granting the petition, the Supreme Court reversed the Eighth Circuit's holding in *Ross*. *Hutto v. Ross*, 429 U.S. 28, 97 S.Ct. 202, 50 L.Ed.2d 194 (1976). The Supreme Court in *Hutto* held that the appropriate standard for the admission of confessions or statements was whether they were voluntary. *Ross, supra*, 97 S.Ct. at 203. *Brady v. United States*, 397 U.S. 742, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970) and *Bram v. United States*, 168 U.S. 532, 18 S.Ct. 183, 42 L.Ed. 568 (1897).

FINDINGS OF FACT

A. *The Petitioner's March 1, 1974 Statement.*

On March 1, 1974, the petitioner appeared in state court for a change of plea hearing. The agreement which was finally negotiated was based upon the plaintiff's agreement to testify against two co-defendants in return for a maximum sentence of seven and one-half years. The respondent also agreed to remain mute if the state court decided to impose probation on the petitioner who had no prior convictions. The colloquy between the state trial judge and the respondent's counsel addressed the terms of the plea agreement as follows:

The Court: Well, I believe the addition to the plea bargain was that

he [petitioner] would testify specifically in the case against Smith and Suggs.

Mr. O'Leary [respondent's trial counsel]: Yes, sir.

The Court: And that that was the State's basic understanding of what he would testify to.

Mr. O'Leary: Yes, sir. Again for the record, your Honor, the State intends to take Mr. Gunsby and Mr. Baker today immediately after these proceedings and obtain statements basically to what was said.[5]

The record of the plea agreement also indicates that the petitioner would testify as to Smith's role in planning the robbery and driving the get away car.

After inquiring personally of the petitioner regarding his decision to plead guilty the court made several findings:

> The Court: The Court further finds you have not been coerced or forced to enter this plea, and the plea is free voluntary, and you have not been offered anything in return for your plea, other than what appears of record in the courtroom this morning.[6]

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5. Record at 261-262.

6. Record at 268.

At the conclusion of the change of plea hearing the court instructed the petitioner in the following manner:

> The Court: Mr. Gunsby, the Court finds that bond which is now posted is broad enough in its scope to also include final disposition, including sentencing, so you are released under that particular bond. It is going to be *your obligation* to remain here in the court with the state and give them a statement here today. Mr. Milton, I am sure, will accompany you. And then take you to probation.[7] [Emphasis Added]

Counsel for the petitioner testified that he would not have permitted the petitioner to testify or give any statement if there had been no plea agreement. Counsel for respondent testified the reason for the statement was to assist in trial preparation and was not a condition of the agreement. Counsel for the respondent when questioned as to whether he would have permitted the plea if the petitioner had not given the statement answered that it was a "hard question" but that he probably would not have moved to vacate the plea.

Subsequent to the change of plea hearing and the statement, the petitioner

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7. Record at 269-270.

testified at the Tony Smith trial on March 28, 1974, at which Smith was acquitted. The respondent, dissatisfied with the petitioner's testimony and the verdict, moved on June 26, 1974, to vacate the plea agreement. The respondent's motion at paragraph two stated:

> 2. That *pursuant* to the said agreement a sworn statement was taken of the defendant, Earl Gunsby, on March 1, 1974, implicating co-defendant in the planning and prior knowledge of the robbery, copy of which is attached hereto and made a part hereof.[8] [Emphasis Added]

Additionally, respondent's counsel during a motion to suppress hearing held on September 5, 1974, gave a similar response:

> Q. [By Mr. Milton, petitioner's counsel]: And subsequent to his change of plea, did he [petitioner] not make a statement to you?
>
> A. [By Mr. O'Leary, respondent's counsel]: He changed his plea to guilty, and shortly thereafter I talked to him at the state attorney's office accompanied by you with the court reporter, Mrs. Bothwell, and he gave a statement.

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8. Record at 5.

> Q. And was this all pursuant to the plea negotiations?
>
> A. Yes.[9]

[1] The petitioner's exposure to and experience with the criminal justice system at the time of the offense was minimal. Gunsby, who was twenty-one years old when the robbery was committed, had had only minor brushes with the law and had never been convicted of a felony prior to the instant case. He had completed the ninth grade and part of the tenth. His testimony indicates a complete reliance on the advise of his attorney and a failure to appreciate either the basic elements or the nuances of the fifth amendment and teachings of *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). The Court finds that the petitioner was not aware of the self-incriminating implications of either his statement or his deposition.

Considering the terms of the plea negotiations and the agreement, the trial court's statements at the change of plea hearing, the testimony of petitioner's and respondent's counsel, and the petitioner's understanding of the proceedings, the Court is of the opinion the statement was not voluntary.

B. *The Petitioner's July 15, 1974 Deposition*

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9. Record at 70.

On July 15, 1974, the petitioner appeared before a court reporter and was deposed regarding his involvement in the robbery of Ronald Brown. Gunsby had been subpoenaed for the deposition by a co-defendant, Gerald Suggs. At the commencement of the deposition, counsel for the respondent made a statement regarding the pending motion to vacate the plea.[10]

During the deposition the petition extensively inculpated himself and Gerald Suggs, and in general discussed the basic facts surrounding the robbery.[11] The petitioner also discussed the planning of the robbery and the beating of Brown by Suggs and Harvey Baker.[12] The petitioner was also questioned at the deposition by trial counsel for respondent, counsel for the co-defendant Suggs, and his own attorney.

At the evidentiary hearing before this Court, O'Leary testified his initial statement was to put the petitioner and his counsel on notice as to the pendency of the motion to vacate and the order to show cause. Counsel for the petitioner, Morris Milton, testified that he permitted the deposition of his client because the petitioner was bound by the plea agreement and he wanted to uphold the bargain.

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10. See note 3 *supra*.

11. Record at 187-224.

12. Record at 200, 201, 204, 205.

Milton stated that he was of the opinion that only a court order could revoke the bargain and the only way the state could use Gunsby as a witness was if he appeared at the deposition. Milton further testified that if the plea had been vacated prior to the deposition, he would not have permitted the petitioner to testify.

[2] The Court is of the opinion that the deposition of the petitioner Gunsby was not voluntary on his part. The petitioner Gunsby was subpoenaed for the deposition and his counsel, anxious to uphold the bargain, permitted the defendant to testify thinking the failure to do so would prejudice the petitioner's chances of maintaining the bargain. The respondent's counsel's statements at the commencement of the deposition are subject to various interpretations. The statement, which did not advise petitioner of the respondent's intention to use the testimony at the petitioner's trial if the motion to vacate was granted, could be interpreted as a threat to petitioner to inculpate Gerald Suggs or suffer the loss of the bargain. It could also be interpreted as a caveat relative to petitioner's fifth amendment privilege.

At the deposition the petitioner inculpated Suggs in the planning and commission of the robbery. Although the bargain with the state related to the petitioner's testimony at the Smith and Suggs trials, the Court is of the opinion the deposition was integrally related to the testimony and part and parcel with the bargain.

CONCLUSIONS OF LAW

In *Hutto v. Ross*, 429 U.S. 28, 97 S.Ct. 202, 50 L.Ed.2d 194 (1976), the Supreme Court held that a confession was not per se inadmissible in a criminal trial as a result of having been made subsequent to a plea bargain that did not call for a confession. The Court enunciated, as a standard for evaluating post plea bargain statements, a test as to whether they were voluntary (i.e. whether the confession was extracted by any sort of threats or violence or obtained by any direct or indirect promises, however slight, or by the exertion of any improper influence). *Id.*, 97 S.Ct. at 203; *Malloy v. Hogan*, 378 U.S. 1, 7, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964); and *Bram v. United States*, 168 U.S. 532, 542, 543, 18 S.Ct. 183, 42 L.Ed. 568 (1897).

The petitioner's statement given on March 1, 1974, was intimately related to the plea bargain reached between the parties and approved by the state court. The state judge who presided at the change of plea hearing instructed the petitioner in the presence of his attorney of the petitioner's "obligation" to give a statement. Trial counsel for the respondent on two occasions, once in a motion and later in a suppression hearing, referred to the March 1, 1974 statement as pursuant to the plea agreement. Although the ex post facto opinions of counsel are not heavily weighted, counsel for petitioner stated he would not have permitted the statement without the

plea agreement. Counsel for the respondent equivocated as to the possible recourse if the statement had been refused.

The facts in the instant case are substantially different from those in *Hutto v. Ross*, *supra*. In *Hutto*, there had been a two week hiatus between the plea negotiations and the sworn statement. Additionally, the prosecutor had advised the defendant of his fifth amendment privilege, his *Miranda* rights, and informed him that "the terms of the negotiated plea bargain were available regardless of his willingness to comply" with the requested statement. *Supra*, 97 S.Ct. at 202. Further, the plea bargain reached in *Hutto* did not involve the obligation of the defendant to testify against any co-defendants. Finally, in *Hutto* the defendant Ross, and not the prosecution, moved to withdraw his plea.[13]

[3] In the instant case the connection both in time and in substance between the bargain and the statement is manifest. The directions of the state judge were mandatory and unequivocal. The respondent's trial counsel failed to advise either the petitioner or his attorney of any of the prophylactic procedures such as those utilized in *Hutto*.

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13. In *Hutto* the defendant's position is more tenuous because he sought to have the plea agreement withdrawn. Since the prosecution moved to revoke the plea in the present instance, it can be argued that the petitioner should be returned to the status quo pre-plea.

Although no party anticipates at the inception of the plea bargain that it will eventually go awry, such a possibility should be clearly enunciated to a defendant who has pled guilty and is about to make a statement. Counsel for the state should inform the defendant of his fifth amendment privilege and his *Miranda* rights. Counsel for the prosecution should also inform the defendant whether the statement was an essential part of the plea bargain (i.e. whether the prosecution would move to vacate the plea bargain if the statement was not given) or whether the statement was not essential to the agreement. Thus, the Court is convinced the statement under the totality of the circumstances was not voluntary.[14]

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14. In *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), the Supreme Court addressed the necessity for procedural safe-guards which would effectively secure the privilege against self-incrimination. *Miranda* specifically focused on in-custody interrogations without the assistance of counsel and the possibility of coercive psychological pressure. The context in which the statement was given in the present case does not fit neatly into the *Miranda* scenario but the differences are not sufficient to warrant a converse result. The petitioner herein was instructed by the state court of his obligation to give a statement and the prosecutor never informed the petitioner of his right to remain silent or the possibility that the statement might be used against him. Although petitioner was represented by counsel, the record should be clear that the petitioner comprehends the possible import of his statements. Here the situation is particularly delicate because the petitioner who has just pleaded guilty and made a statement in a protected forum is asked to make a statement which can potentially be used against him, without being informed of that potentiality. See *Kercheval v. United States*, 274 U.S. 220, 47 S.Ct. 582, 71 L.Ed. 1009 (1927). The Court is of the opinion for the statement to be completely voluntary the petitioner should have been informed of three significant issues: 1) his right to remain silent; 2) the possibility that any statement he makes might be used against him; and 3) that the statement was either essential or nonessential to the fulfillment of his obligations under the plea agreement. Such a requirement will insure knowing and voluntary statements and will demonstrate the nexus between the statement and the plea bargain.

Although the deposition presents a different factual setting, the assessment of the law is the same. Petitioner was subpoenaed to the deposition; he did not voluntarily present himself. Rule 3.220 of the Florida Rules of Criminal Procedure which permits depositions in criminal cases also provides that "a person who refuses to obey a subpoena served upon him may be adjudged in contempt of the court from which the subpoena issued." Although the Florida state courts have adopted the position that the prosecution is not responsible for

the production of its own witnesses at deposition, the prosecution and the non-appearing witness are subject to definite sanctions. *Fla.R.Cr.Pro. 3.220(j)*; *State v. Roig*, 305 So.2d 836 (3d D.C.A. Fla. 1974); and *State v. Deville*, 258 So.2d 492 (3d D.C.A. Fla. 1972).

In the present circumstance, the petitioner had a bargain with the state to testify against the co-defendant Suggs who had subpoenaed him for the deposition. The possibility of the imposition of sanctions against the petitioner through the Florida Rules of Criminal Procedure was clear, but the possibility of other sanctions, specifically the revocation of the plea agreement, was also looming in the foreground. The respondent argues that the motion to vacate, the order to show cause, and the statement of counsel at the beginning of the deposition placed the petitioner on notice as to the possibilities of non-compliance with the bargain. There is no doubt that the petitioner was on notice at the time of the deposition, but the question is as to what. Respondent argues that the petitioner was on that notice that his statement at the deposition might be used against him. Petitioner argues that he was on notice only that non-compliance would result in revocation. Since the petitioner was satisfied with the plea bargain and wanted it enforced, he testified at the deposition so that he could testify at the trial without complications. The deposition inculpated the petitioner and also inculpated the co-defendant Suggs not

only as an accomplice in the robbery, but also as one of the two principal participants.

In *Bram* the Supreme Court suggested consideration of whether the confession was extracted by any direct or implied promises. Here the promise was the bargain; the promise to testify against Suggs and Smith in return for a guilty plea and a seven and one-half year maximum for his sentence. The Court is convinced that the deposition was not voluntary, but part of the promise to testify and compelled by the subpoena.[15]

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15. Rule 410 of the Federal Rules of Evidence and Rule 11(e)(6) of the Federal Rules of Criminal Procedure prohibit the admisison of "statements made in connection with, and relevant to, any of the foregoing pleas or offers . . ." The Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States has recently proposed several changes in Rule 11(e)(6). The most significant change would amend the "in connection with, and relevant to" language. The amendment would change the language to "statements made in the course of or as a consequence of such pleas or plea discussions." *United States v. Herman*, 544 F.2d 791 (5th Cir. 1977) contains a diversity of opinion on the interpretation of the present rule. Although the two federal rules are inapplicable in the present habeas corpus proceeding, they do offer an example of the codification of the voluntariness standard into the plea negotiation

Accordingly, it is ORDERED:

1. That the judgment and sentence entered by the trial court, together with the commitment in said case, be and the same are hereby voided.

2. That the State of Florida shall release petitioner on said charge unless he is brought to trial thereon with one hundred twenty (120) days from this date.

3. In the event petitioner is convicted after a new trial his sentence shall not exceed the sentence imposed at his original trial and he shall be given credit for the period of his prior incarceration.

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and post-plea statements area. It is interesting to note that the most recent revisions of the Florida Rules of Criminal Procedure contain a new rule which follows the Federal Rule. Rule 3.172 of the Florida Rules of Criminal Procedure which was adopted on February 10, 1977, and became effective July 1, 1977, provides:

> Except as otherwise provided in this Rule, evidence of an offer or a plea of guilty or nolo contendere, later withdrawn, *or of statements made in connection therewith,* is not admissible in any civil or criminal proceeding against the person who made the plea or offer. [Emphasis Added]

See generally, Note, *The United States Courts of Appeals: 1976-1977 Term Criminal Law and Procedure*, 66 Geo.L.J. 245, 344-349 (1977).

4. The Clerk is directed to enter judgment and the parties are to bear their own costs.

IT IS SO ORDERED at Tampa, Florida this 14 day of April, 1978.

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA IN AND FOR PINELLAS COUNTY
ST. PETERSBURG TRIAL DIVISION

73-5493 Ct. Cr.

STATE OF FLORIDA	:	
	:	
VS	:	ROBBERY
	:	
EARL GUNSBY	:	

MOTION TO STAY SENTENCING AND VACATE AGREEMENT WITH THE STATE

JAMES T. RUSSELL, State Attorney for the Sixth Judicial Circuit of Florida, moves this Honorable Court for an order granting its Motion to Stay Sentencing and Vacate Agreement with the State, and as good cause and grounds therefor would show:

1. That the above-named defendant, Earl Gunsby, changed his plea to guilty in the above-styled cause on March 1, 1974 in return for the State agreeing to a seven and one half year cap, and in return for the defendant, Earl Gunsby, testifying against co-defendants Tony L. Smith in circuit criminal 73-5545 and Gerald Suggs in circuit criminal 73-5698, a copy of said change of plea transcript being attached hereto and being made a part hereof.

2. That pursuant to said agreement a sworn statement was taken of the defendant, Earl Gunsby, on March 1, 1974 implicating co-defendant Tony L. Smith in the planning and prior knowledge of the robbery, a copy of which is

attached hereto and made a part hereof. The trial in the matter of the State of Florida vs Tony L. Smith was had on March 28, 1974 during which time the defendant, Earl Gunsby, materially and substantially altered, changed, and negated his prior statements and agreements with the State of Florida. Further, at the trial of Tony L. Smith the defendant, Earl Gunsby, was declared an adverse and hostile witness and the State was allowed to cross examine him from the prior statement obtained on March 1, 1974. As a result of Earl Gunsby's inconsistent statements at the trial of Tony L. Smith on March 28, 1974 the defendant, Tony L. Smith, was acquitted, a copy of all the foregoing testimony of Earl Gunsby at the trial of Tony L. Smith being attached hereto and made a part hereof.

3. Your defendant, Earl Gunsby, is currently set for sentencing prusuant to said agreement on June 25, 1974, and it has been agreed between the State and defense counsel Morris Milton that same be temporarily postponed pending the outcome of this motion.

WHEREFORE, your State Attorney prays that this Honorable Court (1) enter its order staying sentencing in this cause; (2) enter its order negating the agreement between the defendant, Earl Gunsby, and the State after proper review of the attached transcripts; and, (3) order that the matter of the State of Florida vs Earl Gunsby be set for trial.

I DO HEREBY CERTIFY that a copy of the above and foregoing was furnished to Morris W. Milton, attorney for the defendant, 1525 16th Street South, St. Petersburg, Florida,

by mail, this 25th day of June, 1974.

JAMES T. RUSSELL, State Attorney
Sixth Judicial Circuit of Florida

/s/ Donald M. O'Leary
Assistant State Attorney

IN THE CIRCUIT COURT FOR PINELLAS COUNTY, FLORIDA

CT. CR. 73-5493

STATE OF FLORIDA)

VS. :

EARL GUNSBY)

O R D E R

This cause coming on to be heard upon the State's Motion to Stay Sentencing and Vacate Agreement with the State and the Court having heard argument of counsel and having considered the transcript of testimony of Earl Gunsby on March 1, 1974 and the transcript of the testimony of Earl Gunsby on March 28, 1974 and further finding that such transcripts show prima facia that Earl Gunsby has departed from the terms and conditions of the plea bargain entered into between himself and the State of Florida on March 1, 1974, it is therefore,

ORDERED that Earl Gunsby shall be and appear before the undersigned at 2:15 P. M. on Friday, the 26th day of July, 1974 at Courtroom E, Judicial Building, 545 First Avenue North, St. Petersburg, Pinellas County, Florida and show cause, if any, why this Court should not vacate and set aside that portion of the said Earl Gunsby's negotiated plea of guilty herein which limits the maximum sentence which may be imposed in this cause to a term of 7 1/2 years incarceration.

IT IS FURTHER ORDERED that the said Earl

Gunsby is hereby committed to the custody of the Sheriff of Pinellas County, Florida to be confined in the Pinellas County Jail pending imposition of sentence in this cause or further Order of this Court.

DONE AND ORDERED in Chambers at St. Petersburg, Pinellas County, Florida this June 27, 1974.

/s/ David P. Patterson
Circuit Judge

copies: Morris Milton
Don O'Leary, Asst. State Attorney
Sheriff

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA IN AND FOR PINELLAS COUNTY ST. PETERSBURG TRIAL DIVISION

73-5493 Ct. Cr.

STATE OF FLORIDA	:	
	:	
vs.	:	ROBBERY
	:	
EARL GUNSBY	:	

ORDER

The foregoing cause coming on to be heard on the State's Motion to Show Cause, counsel for the State and counsel for the Defendant having been heard, and the court being fully advised in the premises, it is thereupon

ORDERED AND ADJUDGED that (1) the agreement as to maximum sentence between the State and the Defendant, Earl Gunsby, is hereby vacated, (2) the Defendant be allowed to withdraw his previously entered plea of guilty, (3) a plea of not guilty is accepted, (4) bond be set at the amount of $10,000.00, and that (5) this case be placed on the calendar to be reset for trial.

DONE AND ORDERED in Chambers, St. Petersburg, Florida, this 28 day of July, 1974.

/s/ Donald P. Patterson
CIRCUIT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 19

No. 78-2364

D.C. Docket No. 75-640-CIV-T-K

EARL GUNSBY,

Petitioner-Appellee,

versus

LOUIE L. WAINWRIGHT, Secretary,
Department of Offender Rehabilitation,

Respondent-Appellant.

Appeal from the United States District Court for the Middle District of Florida

Before THORNBERRY, CLARK and RONEY, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the

transcript of record from the United States District Court for the Middle District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the District Court appealed from, in this cause be, and the same is hereby, affirmed in part and vacated in part.

June 6, 1979

ISSUED AS MANDATE: JUN. 28, 1979

FLORIDA RULES OF CRIMINAL PROCEDURE

Rule 3.220(h)

(h) **Protective Orders**. Upon a showing of cause, the court may at any time order that specified disclosures be restricted or deferred, or make such other order as is appropriate, provided that all material and information to which a party is entitled must be disclosed in time to permit such party to make beneficial use thereof.